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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEMON et al., Defendants and Appellants.	B262406 (Los Angeles County Super. Ct. No. NA096742)

APPEAL from the judgments of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. As to Lemon, conditionally reversed and remanded; as to Johnson, modified, conditionally reversed and remanded.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant James Lemon.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Venda Johnson.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E.

Winters, Assistant Attorney General, Noah P. Hill, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2014, a jury convicted defendants and appellants Venda Johnson and James Lemon of the 1995 murder of an unarmed pizza delivery driver during the course of an attempted robbery. The jury also found true that a principal was armed with a firearm in the commission of the offense. Johnson, the shooter, was sentenced to life without the possibility of parole. Lemon was sentenced to a term of 25 years to life.

Johnson and Lemon were juveniles when the murder was committed in 1995, and were 35 and 36 years old, respectively, when they were prosecuted in criminal court in 2014. They both argued the prosecution's direct filing of charges in criminal court was a retroactive application of former Welfare and Institutions Code section 707, subdivision (d) (hereafter former section 707(d)) that violated the ex post facto clause of both the federal and state Constitutions. Former section 707(d), which was enacted in 2000 and repealed in November 2016, authorized prosecutors to file criminal charges against a juvenile offender directly in the criminal court, without a prior adjudication by the juvenile court that the minor was unfit for a disposition under the juvenile court law.

Lemon raised numerous additional contentions: (1) the record lacked substantial evidence supporting first degree murder and the robbery-murder special-circumstance finding; (2) the court imposed unconstitutional restrictions on his cross-examination of the main prosecution witness; (3) the court erred in admitting an out-of-court statement made by Johnson that

implicated Lemon; (4) the court erred in instructing the jury on first degree felony murder and in failing to instruct on the lesser included offenses of theft and involuntary manslaughter; (5) his 25-year-to-life sentence is unconstitutionally cruel and unusual; (6) the court abused its discretion in denying his discovery motion for peace officer personnel records without holding an in camera hearing; and (7) cumulative error.

Johnson joined in Lemon's contentions regarding the first degree felony-murder instruction and the restriction on cross-examination. Johnson further contended the court's imposition of a parole revocation fine was unauthorized.

In our original opinion, filed October 28, 2016, we affirmed the judgment of conviction as to Lemon. As to Johnson, we struck the parole revocation fine and affirmed his conviction in all other respects.

On November 8, 2016, California voters passed the Public Safety and Rehabilitation Act of 2016 (Proposition 57). As relevant here, Proposition 57 repealed former section 707(d), thereby eliminating the statutory authority for the direct filing of charges against a juvenile offender in criminal court. As amended by Proposition 57, Welfare and Institutions Code section 707, subdivision (a)(1) now specifies that in order for a juvenile offender to be prosecuted in criminal court, the prosecutor must make a motion to transfer in juvenile court, and the issue must be decided by a judge.

After granting both defendants' petitions for review, the Supreme Court transferred the matter to this court with directions to vacate our decision, grant rehearing, and reconsider the cause in light of the following issue: Does Proposition 57

retroactively apply to cases in which the judgment is not yet final?

In accordance with the Supreme Court's directions, we vacate our original opinion, and consider the question of the retroactivity of Proposition 57 as applied to cases, like this one, that are not yet final on appeal. Having done so, we now conclude that both defendants' convictions must be conditionally reversed, and the case must be remanded for a transfer hearing. If the juvenile court concludes that the case should be heard in criminal court, the convictions must be reinstated with only a minor modification to Johnson's parole revocation fine. If not, the juvenile court shall enter an appropriate disposition.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 1995, Renato Teniente, a 60-year-old pizza delivery driver, was fatally shot at close range while sitting in his car in front of an apartment complex in Long Beach. The initial investigation of the crime led the homicide detectives to suspects Lemon and Johnson, who lived in the area. At that time, Lemon was 17 years old and Johnson was 16 years old.

In December 1995, a juvenile petition was filed alleging that Lemon was responsible for the attempted robbery and murder of Mr. Teniente. It appears Johnson could not be located, and no juvenile petition was filed against him at that time. In April 1996, while the prosecution's motion to determine Lemon's fitness for adjudication in juvenile court was pending, the petition was dismissed without prejudice for insufficient evidence.

In 2012, the investigation of the murder was reopened by the Long Beach Police Department. In March 2014, Johnson and Lemon were charged by information with one count of first

degree murder during the commission of an attempted robbery. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17).) It was further alleged that a principal was armed with a firearm during the commission of the offense. (§ 12022, subd. (a)(1).) The information also alleged that both defendants were juveniles who were at least 16 years of age at the time the offense was committed and had fled the jurisdiction after the murder. (Welf. & Inst. Code, § 216, subd. (a), former § 707(d).)

Lemon moved to dismiss the information, arguing primarily that the prosecutor's direct filing of charges in criminal court pursuant to former section 707(d), and the court's denial of his right to a fitness hearing under the law in effect in 1995, constituted violations of the ex post facto clauses of the federal and state Constitutions. Johnson joined the motion. The motion was denied.

Lemon also made a pretrial motion to discover peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Lemon sought records from the personnel files of Long Beach Police Department Detectives Tim Cable and William Collette, two of the detectives involved in the initial investigation, reflecting any past incidents or complaints involving the preparation of false reports, lying and untruthfulness. The court denied the motion.

The joint jury trial proceeded in November 2014. The trial testimony and evidence revealed the following material facts.

1. The Murder and Initial Investigation in 1995 and 1996

In 1995, Mr. Teniente worked two jobs to support his family. One of those jobs was delivering pizzas for a Pizza Hut restaurant in Long Beach. Just before 9:00 p.m. on November 22, 1995, Officer Aldo Decarvalho of the Long Beach Police

Department responded to a report of shots being fired at an apartment complex on East 55th Way. When Officer Decarvalho arrived at the apartment building, he saw a car parked near the curb. The engine was running, the driver's side door was closed, and the front passenger door was open. As Officer Decarvalho approached the car, he found Mr. Teniente slumped over the steering wheel from an apparent gunshot wound. After emergency medical personnel arrived on the scene, Mr. Teniente was pronounced dead. The cause of his death was later determined to be a fatal gunshot wound to his chest, the bullet having entered through his shoulder.

In November 1995, 12-year-old S.D.[1] lived in the apartment complex where the shooting occurred. When Long Beach police officers first came to her family's apartment on the night of the shooting to ask if anyone had seen or heard anything, S.D. was very scared so she told them she did not know anything about what happened. Her 15-year-old sister, Y.W., also denied any knowledge of the incident.

The detectives working the case learned that Mr. Teniente was delivering pizza that night to S.D. and Y.W.'s apartment. The call to Pizza Hut had come from their apartment. On November 30, Sergeant William Blair and his partner, Detective Paul Arcala, went back to the apartment complex to reinterview S.D. and Y.W. Sergeant Blair spoke to Y.W., and Detective Arcala spoke separately to S.D.

When Sergeant Blair asked Y.W. about the pizza order being phoned in from their apartment, she initially said she had

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[1] We refer to the witnesses, many of whom were juveniles at the time, only by their initials to protect their privacy.

made the call. He told her the caller had been identified as a male. Y.W.'s "demeanor changed quickly." She teared up and said that "James" (defendant Lemon)[2] had made the call. She said James was a friend of her boyfriend "Venda" (defendant Johnson) who had also been over at the apartment that night. She said that she and Venda had been upstairs kissing in her mother's bedroom. About 20 minutes after the pizza was ordered, S.D. came upstairs and Venda gave her money to go pay the delivery man. Shortly thereafter, Venda left Y.W. in the bedroom and went downstairs. A few minutes after that, her sister and brother came into the bedroom "hysterical" and told her that the delivery man had been shot. Y.W. claimed to not know Venda's last name or to have any contact information for him or his friend James.

While Sergeant Blair was talking with Y.W., Detective Arcala talked with S.D. and asked her what really happened that night. S.D. said that she and Y.W. had been home, and two male friends had dropped by to visit. She said their names were James and Venda and that Venda was Y.W.'s boyfriend. At some point, James called Pizza Hut and ordered pizza. Before the pizza delivery man arrived, James and Venda were talking "secretively." Y.W. and Venda then went upstairs to her mother's bedroom and S.D. and James stayed downstairs. After a short while, S.D. went upstairs and Venda gave her money to go outside to pay for the pizza when it arrived.

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[2] To be consistent with how the information developed during the investigation, we occasionally refer to Lemon and Johnson by their first names.

S.D. went outside and paid the delivery man, who was parked at the curb. While she was walking back towards the apartment building with the pizzas, both James and Venda ran past her towards the delivery man's car. S.D. saw a gun in Venda's hand. Venda went to the driver's side of the car and James went to the passenger side. She heard Venda repeatedly yelling at the delivery man to give him the money and to open the door. She saw James open the passenger side door. She ran to her apartment and, after she got inside, she heard a gunshot. S.D. looked out a window that overlooked the courtyard and saw James and Venda running together through the courtyard. Shortly thereafter, "Tyrone" contacted her and told her to get rid of the pizza boxes. S.D. initially placed the boxes under her bed, but she became nervous when she saw all of the police officers arriving at the building so she climbed out her bedroom window and tossed the boxes onto the roof.

S.D. also told Detective Arcala that Venda called a couple of days after the shooting. She asked Venda why he shot the delivery man, and he told her that the man had not "braced" himself quickly enough, which S.D. understood to mean he had not given up his money quickly enough. Venda also told her that the delivery man had a gun, and if he had not shot him first, then "he and James would be dead."

On concluding the interviews with the girls, which lasted about 30 minutes, Sergeant Blair told Y.W. not to talk to anyone involved in the case.

After returning to the station and attempting to determine the identities of James and Venda, the detectives decided they needed to speak with the girls again. This time, Detectives Thrash and McGuire went to the girls' apartment. Y.W. told

Detective McGuire that she had spoken to Tyrone, who told her that James and "Fatts" had walked by her apartment and saw the police car there, and that James and Venda were "gone." Police discovered that Y.W. had paged Johnson, though he did not respond, and that she had spoken to members of his family by telephone. Y.W. was arrested as an accessory after the fact.

Detective Collette interviewed Tyrone H. in December 1995 and again in early 1996. Tyrone had lived in the apartment complex but his family moved out a few days before the shooting. Tyrone told Detective Collette that about a week after the shooting, Y.W. called him and asked if he had seen Lemon or Johnson. He told her he had not. She then said that the police were looking for both of them because they had shot a pizza delivery man. He asked her how she knew that, and she said she had seen what happened. During that phone call, Tyrone's call waiting beeped and it was Lemon on the other line. He told Lemon he was speaking to Y.W. on the other line and that she said he and Johnson had shot the delivery man. Lemon responded, "I was there, but I didn't shoot." Tyrone then called Lemon and Y.W. back as a three-way call. Lemon asked Y.W. how the police knew about him. She said she did not know but that the police were looking for him and were going to go to his house.

Tyrone denied telling S.D. to get rid of the pizza boxes. He said that about a week before the shooting, he remembered Johnson showing him a .38-caliber revolver. Tyrone also reported that, after Y.W. was released from jail, he spoke with her again, and she said that she no longer had anything to do with Johnson because of "all the trouble" he caused.

In March 1996, Detective Collette interviewed V.B., another resident of the apartment complex. V.B. said that on the night of the shooting he had gone outside to take out some trash, when he saw three young African-American males go into the laundry room. One of them was carrying a trash bag and another one was holding a revolver. After the three men left, V.B. looked inside the trash bag, which had been left in the laundry room. It contained a shirt and a pair of pants that appeared to have blood on them. He went back to his apartment and told his mother what he had seen. When he went back to the laundry room, the trash bag was gone.

When shown six-pack photographic lineups, V.B. was unable to positively identify either Lemon or Johnson as one of the three individuals he saw go into the laundry room that night. However, he did point to Lemon's photograph and said he looked like one of the three individuals, but he could not be sure. He thought the individual's hair had been longer. When Detective Collette pointed to Johnson's photograph in another group of photographs and asked if he could eliminate him as one of the individuals he saw, V.B. said he could not do so. He told Detective Collette that one of the individuals that night may have been someone from the neighborhood he knew as Fatts.

After Lemon was detained, a live lineup was arranged. Detective Cable picked up V.B. and brought him to the juvenile detention facility to view the lineup. V.B. said the individuals standing in position Nos. 3 and 6 looked like possibilities, but he was unable to positively identify anyone. However, after the lineup procedure was concluded, Detective Cable overheard V.B. tell the deputy district attorney that he thought the person in position No. 3 was one of the individuals he saw go into the

laundry room that night. Lemon had been standing in position No. 3. However, V.B. did not sign any form formally making an identification.

2. The Reopening of the Investigation in 2012

In 2012, Detective Todd Johnson of the Long Beach Police Department was assigned to review the 1995 murder of Mr. Teniente as a "cold case."

On March 9, 2012, Detectives Johnson and Evans reinterviewed S.D. He did not show her any old police reports, but simply asked her what she recalled of the events in November 1995. He did not ask her specific questions because he wanted her to just make a statement about what she remembered without influencing her. S.D. was "very emotional" and cried during the interview. She said the shooting had been a traumatic experience for her as a young girl, and it had been "weighing" on her for a long time. S.D. said she had been at home with her sister and brother when Lemon and Johnson came over to visit. She recalled Johnson ordering pizza and defendants giving her money to go downstairs to meet the pizza delivery man and pay for the pizzas. She said her little brother went with her, and when the two of them were walking back to the apartment with the pizzas, Johnson and Lemon ran past them. S.D. said she saw a gun in Johnson's hand as he went by. She remembered something like "brace yourself, give me the money" being yelled at the delivery man. Johnson was on the driver's side of the car, and Lemon was on the passenger side. She then heard a gunshot and saw the delivery man slump forward. She ran upstairs with her brother and told Y.W. that Johnson had just shot the delivery man. S.D. was scared about having the pizzas in the apartment, so she first put the boxes under her bed, then climbed out her

window and threw them outside. S.D. identified Lemon and Johnson in six-pack photographic lineups. She also identified a photograph of someone from the neighborhood she knew as Fatts.

Some of the details S.D. provided were slightly different, but Detective Johnson thought "the gist of who was there and how the facts lined up" was the same as what she told the police in 1995. The main differences in 2012 were that she admitted to actually seeing the shooting, and not just hearing the gunshot, and did not mention speaking with Johnson after the shooting.

Toward the end of the interview, Detective Johnson said S.D. appeared to be weak and very tired, so he and his partner drove her to the emergency room where she received treatment related to her diabetes. Because they had been unable to record her statement before the episode occurred, they arranged to meet with her again about 12 days later. S.D. was in custody at the time on an unrelated drug possession charge. S.D. agreed to have her statement recorded.

Detective Johnson saw S.D. again about two years later when she was in custody on another unrelated charge. He asked her if she remembered him and the "pizza man case" and she "blurted out" that "Venda killed the pizza man; James wasn't there; I'm not testifying; they are going to kill me if I testify."

About six months after the initial interview of S.D. in 2012, Detective Johnson and his partner interviewed Tyrone while he was in custody on an unrelated charge in Colorado. Tyrone identified both defendants in photographic lineups and confirmed his prior statements to police that, after the shooting, he had a three-way conversation with Lemon and Y.W. in which Lemon admitted "they" had robbed the pizza delivery man but he had not done the shooting.

Detective Johnson said it was common for witnesses in a homicide case to express concern about testifying, particularly if there are any gang ties to the people involved. Tyrone expressed concern for his safety. Detective Johnson explained that Los Angeles County had a program to assist witnesses with relocation expenses if they had safety concerns related to testifying. He offered relocation assistance to Tyrone, Y.W., S.D. and V.B.; the only one who accepted the offer was Tyrone. Detective Johnson applied for him to receive several months of relocation assistance.

Detective Johnson interviewed V.B. in November 2012. His memory of the incident was "fuzzy," but he did recall going to a live lineup procedure at the juvenile detention facility in 1996. Detective Johnson showed V.B. six-pack photographs, and V.B. acknowledged knowing Lemon. Detective Johnson asked him why he did not identify Lemon in 1996, and V.B. said he had been scared. He did not want his family to get hurt. V.B. told him several times that he did not want to be a snitch and that he was very concerned for his safety, particularly after seeing all of Lemon's family at the courthouse.

3. S.D.'s Trial Testimony

S.D. admitted she first told police officers in 1995 that she did not know anything about the shooting. She had denied any knowledge because she was scared. About a week later, the police officers returned to interview her and her sister again. She and Y.W. were interviewed separately in different rooms of the apartment. The police told S.D. they were going to take Y.W. to jail, so she started to answer their questions. S.D. explained her memory of the incident was better in 1995 and she had tried to be honest with the police officers in answering their questions.

S.D. testified that around 8:00 p.m. on November 22, 1995, she was at home with her sister, Y.W., and their 10-year-old brother. Neither her mother nor grandmother were home at the time. Y.W. was dating Johnson. He came over that evening with his friend, Lemon, to hang out at their apartment. They decided to order pizza. She could not remember who called Pizza Hut, but acknowledged she told the officers in 1995 that it was Lemon who phoned in the order. Lemon had been downstairs with her while Y.W. was upstairs in a bedroom with Johnson. S.D. did not recall telling the police she saw Johnson and Lemon talking "secretly" in the apartment.

S.D. recalled getting money from Lemon to go outside and pay for the pizza when it arrived, but acknowledged telling the police in 1995 that Johnson had given her the money. She went downstairs and paid the pizza delivery man who was parked at the curb. As she started to walk back toward the apartment, Johnson and Lemon ran past her. Johnson went to the driver's side door of the delivery man's car, and Lemon went to the passenger side. S.D. heard Johnson yell at the man to give him his money. The driver said he did not have any more money. S.D. did not hear Lemon make any demands of the driver, and she did not recall telling the police she saw Lemon open the passenger side door. She recalled that Johnson shot the driver after demanding his money and the driver then slumped forward toward the steering wheel.

S.D. said she told the police in 1995 that she saw the gun in Johnson's hand, but she did not actually see it because it was dark outside and she has suffered from diabetes since childhood which affects her vision. She admitted she only saw the fire or flash from the gunshot.

After the shooting, Johnson and Lemon ran towards the back of the apartment complex, and S.D. ran upstairs to her apartment. She told her sister Johnson had shot the pizza delivery man. S.D. was scared and in a state of panic. She acknowledged telling the police in 1995 that Tyrone told her to get rid of the pizza, so she climbed out her bedroom window and tossed the pizza boxes up onto the roof.

S.D. recalled that a couple of days after the shooting, Y.W. spoke to Johnson on the phone. During that conversation, Johnson told Y.W. he shot the pizza delivery man because he thought he was reaching for a gun and would shoot him and Lemon. He also said the driver was not "bracing" quickly enough, which S.D. understood to mean he was not giving up his money quickly enough. S.D. said she also may have spoken to Johnson on the phone.

S.D. said the police interviewed her again in 2012, and she once again had tried her best to tell them the truth. Towards the end of the interview, she started to feel ill and was taken to the hospital to be treated for diabetic issues, mental health issues and anxiety. About two weeks later, she spoke with the police again and they recorded her statement. The recording of the 2012 interview was played for the jury. A transcript was admitted as People's exhibit 5. S.D. confirmed it was her voice on the recording.

During cross-examination, S.D. denied that she was unsure whether it was in fact defendants who ran past her toward the delivery man, reiterating that "it was Venda and James." Her preliminary hearing testimony in which she had testified she was unsure who it was and that she believed Lemon had left by the time she heard the gunshot were read into the record. S.D.

admitted on both direct and cross-examination that in addition to poor vision from diabetes, she also has had substance abuse problems over the years. She admitted she had been charged with possession of methamphetamine, and the case was resolved with a drug diversion program. She said she often felt pressured by the police officers to respond to their questions, including when they went to her son's school to attempt to question her. S.D. also felt the police had sometimes tried to put words in her mouth.

4. Y.W.'s Trial Testimony

Y.W. testified that the shooting in 1995 had been a "terrible event." She had been at home with S.D. and their younger brother. Johnson was her boyfriend at the time and he had come over with his friend, Lemon. Her mother and grandmother were not at home. They decided to order pizza but she could not recall who called in the order. She had been "making out" with Johnson, so she knew it was not him. She acknowledged she may have agreed with the police that it was Lemon because he was the only other male in the apartment. Her brother was too little at the time to have called in the order. The police told her the call had been made by a male so she assumed it was Lemon, but he was downstairs and she had no idea what he was doing. At some point, Johnson left the bedroom and did not come back. She then heard a gunshot and believed her sister started screaming about the pizza delivery man having been shot. Y.W. denied that her sister ever told her that she saw Johnson shoot the delivery man or that Lemon and Johnson had robbed him.

Y.W. denied ever having a phone conversation with Tyrone or with Lemon, and definitely could not recall a three-way phone call. She said they were not good enough friends for her to do

that. She said she did not know Lemon that well, but remembered he was a "good kid." She said she did not recall ever telling Tyrone that the police were looking for Lemon and Johnson. She denied ever telling Tyrone in person or over the phone that Lemon and Johnson had robbed the pizza delivery man or that Johnson had shot him.

Y.W. admitted that she had paged Johnson after the police told her not to have contact with him, but he had not returned the page. She said she was arrested after that. She was detained in the same juvenile facility as Lemon and would see him at church services. The accessory charge against her was eventually dismissed. When asked if she knew how Tyrone would have known information like she had no further relationship with Johnson or that she saw Lemon at church while at the juvenile facility if she had not had telephone conversations or other contact with Tyrone, Y.W. said she did not know. She said she did not recall any telephone conversations with Tyrone.

Y.W. was reinterviewed by the police in 2009. She believed her memory of what happened was probably better when she was interviewed in 1995 and 2009 than in 2014. The recording of her 2009 interview was played for the jury. A transcript was admitted as People's exhibit 7.

5. Tyrone's Trial Testimony

Tyrone testified that he used to live in the apartment complex where the shooting occurred, but his family had moved out either the day of, or the day before, it occurred. A few days after the shooting, he received a phone call from Y.W. She told him the police were looking for Venda and James. During the call, his call waiting beeped and when he switched over to see who was on the other line, it was Lemon. He told both of them he

would call back, and he called them back so they could talk together on a three-way call. Lemon told Tyrone and Y.W. that "they" had robbed the pizza delivery man, but he had not done the shooting.

Tyrone also said he had seen Johnson with a .38-caliber revolver. He was not certain of how long before the shooting Johnson had shown the gun to him, but it may have been a couple of weeks before. He also recalled speaking to Y.W. after the charges were dropped against her for being an accessory, and she told him that she had seen Lemon during church services on Sundays at the juvenile detention center. She also told him that she did not want to have anything further to do with Johnson because of all the trouble he had gotten her into.

Tyrone's 2012 interview with Detectives Johnson and Evans was played for the jury. A transcript was admitted as People's exhibit 9. He acknowledged his voice on the recording and confirmed that the statements he made to the detectives were truthful. He also recalled speaking to detectives in 1995 but could not recall the details of what he said. He said, however, that whatever statements he made, he assumed he had been trying to be truthful at the time.

Tyrone could not recall the names of the detectives he spoke with in December 1995 and early 1996, or some of the specifics of what he said. But, he recalled telling them that when he spoke with Lemon on the phone after the shooting, Lemon admitted to robbing the pizza delivery man, but that he did not shoot him. The recording of the interview in 1996 was played for the jury. A transcript was admitted as People's exhibit 11. Tyrone acknowledged it was his voice on the recording. He said

he thought his memory of the events was probably better at the time he gave the statement.

On cross-examination, Tyrone acknowledged that what he told the police was that Lemon admitted being present when the pizza delivery man was shot, but that he did not shoot him, and not that Lemon ever admitted to robbing the man.

Tyrone also admitted when he was initially questioned about the incident in 1995, he had been arrested as a suspect in the shooting. He told the officers that he knew Johnson better than Lemon but they had all hung out together. He had known them for a few years before the incident. Lemon was always doing his homework and Tyrone told the police he thought it was surprising for Lemon to be involved in any shooting. He said another friend from the neighborhood was known as Fatts. He did not recall telling the detectives that Johnson had been calling him from Texas to find out if it was safe for him to come home. He admitted that while he was not at the apartment complex on the night of the shooting, he had called S.D. and Y.W.'s apartment and told S.D. to get rid of the pizza boxes. He did not remember previously telling the detectives that he had not done so.

Tyrone admitted he had prior convictions for grand theft, drug distribution, and felony menacing. He also confirmed that he had been given money by the prosecution for relocation expenses. He said he showed the money to Y.W. because she told him she was scared to testify, and he told her that the prosecution had helped him relocate and they could probably help her too.

6. V.B.'s Trial Testimony

V.B. testified he lived in the apartment complex at the time of the 1995 shooting. He could not recall much about it since it happened so many years before. He did not remember his interview with the detectives. V.B. repeatedly expressed his desire not to be involved and that he did not want to be testifying. He said snitches do not last that long on the street. However, he also said he does not lie and if he made statements to the detectives earlier, he would not disavow them. He recognized a photograph of Lemon in court and said he had known a lot of the boys from the neighborhood since they were very young. He denied being scared of Lemon or telling the detectives that Lemon's father and uncle were Southside Crips. The recording of his 2012 interview was played for the jury. A transcript was admitted as People's exhibit 13. He acknowledged it was his voice on the recording.

7. The Prosecution's Other Witnesses

Deputy Araceli Hernandez testified to being a deputy providing security at a hospital facility while S.D. was there in 2014. At one point during her shift, S.D. was crying and told Deputy Hernandez she was frightened about testifying because if she told the truth about what she saw "they were going to kill her." She told Deputy Hernandez that when she was a little girl, her sister's boyfriend and friend ordered pizzas, robbed the delivery man and then shot him.

Johnson's father, Venda Johnson, Sr. (Mr. Johnson), testified that he spoke with homicide detectives in 1999 about his limited contact with his son while he was growing up. He denied ever telling them anything about the shooting in Long Beach because he said he did not know anything about it.

Officer Dana Hatfield testified that she was a police officer for the City of Aurora in Colorado. In 1999, she was investigating a crime that had occurred in Aurora, and, as part of her investigation, she came to Los Angeles to interview Mr. Johnson. She interviewed him while he was in custody on an unrelated charge in Men's Central Jail. Mr. Johnson told her that he had been in prison for a part of his son's childhood, but had tried to see him when he could after he was released. Mr. Johnson asked Officer Hatfield if she knew anything about "what happened" in Long Beach. She asked him to explain and he said that his son had called him and told him that he had shot a pizza delivery man. He had been with his girlfriend and friend, and they decided to order pizza and rob the pizza man. Mr. Johnson said his son only shot the delivery man because he thought the man was reaching for a gun to shoot him.

8. The Defense Case

Defendants exercised their right not to testify. Johnson did not call any witnesses. Lemon offered the testimony of several witnesses.

Katherine Chavers-Yanes, a private investigator, testified to interviewing S.D. in early 2014. Defense counsel accompanied her. S.D. told her that she only had a vague recollection of the 1995 shooting and that she was pressured by the detectives who had gone to her son's school to find her and question her. S.D. told Ms. Yanes that she told the detectives what they wanted to hear. S.D. said she had only been clean and sober for about a year, following completion of a drug diversion program. She told Ms. Yanes that Lemon had not robbed or shot the delivery man. She admitted she did know Lemon and that he had been at the apartment that night.

Robin Sawyer, another defense investigator, also attested to interviewing S.D., Y.W. and V.B. He said that Tyrone was the only witness who would not agree to speak with him. He said Y.W. acknowledged that she, S.D., possibly her brother, Johnson and Lemon were all at the apartment that night, but that she had no information whatsoever about Lemon being involved in any robbery or the shooting. She was not sure but she thought Johnson might have called in the pizza order. She said S.D. never told her that Johnson and Lemon were involved. She denied having any three-way phone conversation with Tyrone and Lemon. When Mr. Sawyer interviewed S.D., also in 2014, she said she has very poor vision and was supposed to wear glasses, but was not wearing any glasses on the night of the shooting. She said she had no knowledge of Lemon being involved in taking anything from the delivery man or shooting him. When he interviewed V.B., he denied ever making any identification of Lemon. Mr. Sawyer noted that V.B. seemed genuinely concerned about testifying, and expressed a strong desire not to be labeled a snitch.

Lemon's wife and one of his daughters attested to his nonviolent nature. His wife said they had known each other for 18 years and had four children together. Lemon went to school to become an electrician and they moved to Las Vegas, Nevada after he completed his education. He has worked as an electrician ever since. She said he never argues and always tries to diffuse a difficult situation peacefully. His daughter said he was very involved with his children, helped with coaching and their other activities, and was always trying to teach them right from wrong.

9. The Verdict and Sentencing

The jury found defendants guilty of first degree felony murder and found true the special circumstance allegation that the murder was committed during the attempted robbery of the victim within the meaning of Penal Code section 190.2, subdivision (a)(17)(A). The jury also found true the allegation that a principal was armed with a firearm.

Lemon filed a motion to arrest the judgment or alternatively for a new trial, raising numerous issues, including that the denial of a fitness hearing constituted an ex post facto application of former section 707(d). The motion was denied.

Johnson was sentenced to a life term without the possibility of parole. Lemon was sentenced to a term of 25 years to life. The court imposed and stayed sentences on the firearm enhancement as to both defendants. The court also imposed various fines and fees. The fines imposed on Johnson included a $10,000 parole revocation fine pursuant to Penal Code section 1202.45.

Both defendants filed timely appeals. We affirmed their convictions in our original unpublished decision filed October 28, 2016. After the Supreme Court granted defendants' petitions for review and transferred the cause to this court for further consideration, all parties filed supplemental briefs addressing the question of the retroactivity of Proposition 57.

DISCUSSION

1. Defendants Are Entitled to a Transfer Hearing

The Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21) was passed by the voters March 7, 2000, and became effective the next day. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 165.) Proposition 21 made numerous

changes to certain laws applicable to juveniles accused of committing criminal offenses. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 545.) As relevant here, Proposition 21 amended former section 707(d) to confer "upon prosecutors the discretion to bring specified charges against certain minors directly in criminal court, without a prior adjudication by the juvenile court that the minor is unfit for a disposition under the juvenile court law." (*Manduley*, at p. 545.)

As amended by Proposition 21, former section 707(d) provided that "[e]xcept as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b)." Murder is an enumerated offense in subdivision (b) of Welfare and Institutions Code section 707.

After the filing of our original opinion affirming defendants' convictions, the voters passed Proposition 57. It became effective the next day, November 9, 2016. (Cal. Const., art. II, § 10, subd. (a).) As relevant here, Proposition 57 repealed former section 707(d). As amended by Proposition 57, Welfare and Institutions Code section 707 now requires a prosecutor to make a motion for transfer in the juvenile court in order to prosecute a juvenile offender in criminal court. In relevant part, the statute now specifies: "In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from

juvenile court to a court of criminal jurisdiction." (§ 707, subd. (a)(1).) After consideration of certain specified criteria, "the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction." (*Id.*, subd. (a)(2).)

In other words, currently, a prosecutor must move to transfer a case from juvenile court to criminal court rather than directly filing any case against a minor in criminal court. The juvenile court—not the prosecutor—must decide whether the case should be transferred. The choice of courts has "immense" consequences because the purpose of the juvenile court is rehabilitation, and the purpose of an adult court is punishment.[3] (*People v. Smith, supra*, 110 Cal.App.4th at p. 1080.) The electorate was aware of the important distinction between rehabilitation and punishment, as the Voter Information Guide describing Proposition 57 explained: "Juvenile court proceedings are different than adult court proceedings. For example, juvenile court judges do not sentence a youth to a set term in prison or jail. Instead, the judge determines the appropriate placement and rehabilitative treatment (such as drug treatment) for the youth, based on factors such as the youth's offense and criminal

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[3] " 'An adult court may sentence a defendant to life imprisonment; a juvenile court cannot impose confinement beyond the age of 25. [Citations.] Adult convictions are public but juvenile commitments are sealed [citations], a difference that affects future employability and many other matters. Adult convictions are criminal in character, and may deprive the person convicted of the right to vote [citation], to serve on a jury [citation], to carry firearms [citation] and to enter certain professions [citation]; juvenile convictions carry no such collateral consequences.' " (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1080.)

history." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57 by the Legislative Analyst, p. 55.)

The issue here is whether Proposition 57 applies retroactively to Lemon and Johnson, whose convictions were not final at the time the new law became effective. For reasons we shall explain, we conclude that although there is a general presumption that new laws apply prospectively (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287), an exception to that presumption articulated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) applies to this case.

As subsequently explained in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), *Estrada* held: "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*Brown, supra*, at p. 323.) *Estrada* "articulate[ed] the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*Brown, supra*, at p. 324.)

The rationale for *Estrada*'s holding was clear: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . [T]o hold otherwise would be to conclude that

the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada, supra*, 63 Cal.2d at p. 745.) ". . . *Estrada* stands for the proposition that, 'when the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.' " (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

As the Attorney General emphasizes, *Estrada* generally applies only to the reduction of penalty " ' "*for a particular crime*." ' " (*Brown, supra*, 54 Cal.4th at p. 325.) Nevertheless, we conclude that the rationale applies here because our Supreme Court held that "the certification of a juvenile offender to an adult court has been accurately characterized as 'the *worst punishment* the juvenile system is empowered to inflict.' " (*Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 810, italics added; see *People v. Macias* (1997) 16 Cal.4th 739, 750; *Marcus W. v. Superior Court* (2002) 98 Cal.App.4th 36, 41.) Although in contrast to *Estrada*, this "worst punishment" applies to several crimes—not just one—Proposition 57 mitigates the punishment for those crimes. To hold that Proposition 57 does not mitigate punishment because it applies broadly to more than one crime would undermine *Estrada* and is not required by *Brown*.[4]

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[4] In *Brown*, the Supreme Court considered whether former Penal Code section 4019 should be retroactively applied. The high court held that "a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense . . . . Former section 4019 does not

People v. Benefield (1977) 67 Cal.App.3d 51 supports application of *Estrada* to this case. In *Benefield*, a juvenile was sentenced to state prison before a new statute was enacted stating that "a minor under the age of 18 years when he committed his offense might not be directly sentenced by the superior court to state prison" but must first be remanded for evaluation. (*Benefield*, at pp. 56-57.) The court held that *Estrada* applied and required retroactive application of the new law. (*Benefield*, at pp. 57-58.) The modification requiring an evaluation prior to a state prison sentence "operate[d] to benefit, and in effect impose a lighter punishment" on, the defendant. (*Id*. at p. 57.) Just as the requirement for an evaluation mitigated punishment in *Benefield*, here the requirement in Proposition 57 for a transfer hearing mitigated punishment and is retroactive. Moreover, *Estrada* applies even though the reduction in penalty is potential (not certain) and is based on judicial discretion. (*People v. Francis* (1969) 71 Cal.2d 66, 77-78.)

The purposes of Proposition 57 further support the conclusion that it was intended to apply retroactively. The initiative was intended to " ' "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; and "[r]equire a judge, not a prosecutor, to decide whether juveniles

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alter the penalty for any crime; a prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Brown, supra*, 54 Cal.4th at p. 325.) *Brown* is distinguishable from this case because it did not concern punishment for a crime but credits earned after punishment was imposed. Our case more closely resembles *Estrada* than *Brown*.

should be tried in adult court." ' " (*People v. Vela* (2017) 11 Cal.App.5th 68, 75.) Requiring judicial resolution of a defendant's fitness for adult court was a method to mitigate punishment directed at juveniles. Whereas prior law sought to "expand the authority of courts of criminal jurisdiction over juveniles who commit criminal offenses" (*People v. Arroyo* (2016) 62 Cal.4th 589, 596), Proposition 57 expands the authority of the juvenile courts and thereby emphasize rehabilitation.[5] Nothing in the Voter Information Guide suggests the electorate was under the impression that the proposition would be given prospective effect only. (See *People v. Nasalga, supra*, 12 Cal.4th at p. 796.)

We recognize that only one of several cases considering the retroactivity of Proposition 57 has concluded that the proposition is retroactive. (*People v. Vela, supra*, 11 Cal.App.5th 68.) In our view, those cases that conclude Proposition 57 is not retroactive incorrectly determined that the rationale of *Estrada* does not apply to Proposition 57. (*People v. Marque*z (2017) 11 Cal.App.5th 816, 820-824; *People v. Mendoza* (2017) 10

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[5] The Voter Information Guide describing Proposition 57 explained: "Youths accused of committing certain severe crimes would no longer automatically be tried in adult court and no youth could be tried in adult court based only on the decision of a prosecutor. In addition, the measure specifies that prosecutors can only seek transfer hearings for youths accused of (1) committing certain significant crimes listed in state law (such as murder, robbery, and certain sex offenses) when they were age 14 or 15 or (2) committing a felony when they were 16 or 17. As a result of these provisions, there would be fewer youths tried in adult court." (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 57 by the Legislative Analyst, p. 56.)

Cal.App.5th 327, 347; *People v. Superior Court (Walker)* (June 8, 2017, D071461) 2017 WL 2472601.)[6]

Because Proposition 57 should be applied retroactively, Lemon and Johnson are entitled to a transfer hearing.[7] Their convictions therefore must be conditionally reversed. If the juvenile court judge determines their case should be heard in criminal court, their convictions and sentence must be reinstated. If the juvenile court determines that they should remain under the jurisdiction of the juvenile court, then it should impose an appropriate disposition. (*People v. Vela, supra*, 11 Cal.App.5th at pp. 82-83.) This postjudgment hearing with a concomitant procedure has been sanctioned in other contexts (Pen. Code, § 1170.17, subd. (b)(2)), and a similar procedure is necessary in this case.[8] (See *People v. Cervantes, supra*, 9 Cal.App.5th at p. 614 [Pen. Code, § 1170.17 "allows for transfer from criminal court to juvenile court before sentencing for the express purpose of a fitness hearing"].)

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6 The California Supreme Court has granted review in *People v. Cervantes* (2017) 9 Cal.App.5th 569 (May 17, 2017, S241323) and *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753 (Apr. 19, 2017, S241231).

7 Although defendants' current ages are relevant to the juvenile court's determination on remand, they are not relevant to the retroactivity of Proposition 57. Our task on remand was to consider whether Proposition 57 applies retroactively.

8 Because we conclude defendants are entitled to a transfer hearing, we need not consider their argument that the former statute violated the ex post facto law by allowing direct filing in criminal court.

2. Lemon's Insufficient Evidence Claims

Lemon contends the record lacks substantial evidence supporting his conviction for first degree felony murder and the jury's true finding on the robbery-murder special-circumstance allegation. We disagree.

Our task is to review " 'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' " (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 577.) "These same standards apply to challenges to the evidence underlying a true finding on a special circumstance." (*People v. Banks* (2015) 61 Cal.4th 788, 804 (*Banks*).)

a. First Degree Felony Murder

"One who unlawfully kills a human being during the commission of a robbery or an attempted robbery is guilty of first degree murder under the felony-murder rule. [Citations.] 'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' (§ 211.)" (*People v. Thompson* (2010) 49 Cal.4th 79, 115 (*Thompson*).) "All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (Pen. Code, § 31.)

Lemon was convicted as an aider and abettor of Johnson in the attempted robbery and resulting murder of Mr. Teniente. Lemon argues there is insufficient evidence he had an intent to aid and abet a robbery. He contends the evidence does not demonstrate any knowledge on his part that Johnson had a gun or intended to use force against the delivery man. At best, he argues, there is evidence from which it could be inferred he entertained the intent to aid and abet *a theft*, but not a taking "accomplished by means of force of fear." (Pen. Code, § 211.) We disagree.

" 'Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea.' " (*Thompson*, *supra*, 49 Cal.4th at p. 116.) "Under the felony-murder rule, an accomplice is liable for killings occurring while the killer was acting in furtherance of a criminal purpose common to himself and the accomplice, or while the killer and the accomplice were jointly engaged in the felonious enterprise." (*Id.* at p. 117.) "The mental state required is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The evidence, judged in its totality and under the appropriate standard, demonstrates that Lemon and Johnson planned to rob the pizza delivery man. Lemon ordered the pizza from S.D. and Y.W.'s apartment while Johnson was upstairs with Y.W. The defendants gave S.D. money to go pay for the pizzas, and then immediately after she had paid for them, they ran past her and confronted the delivery man. A reasonable inference from such conduct is that they used S.D. as a diversion, letting

Mr. Teniente believe this was just an ordinary delivery and would likely be taken off guard by their abrupt appearance and demands for money. Johnson and Lemon positioned themselves on either side of the car, preventing any means of escape and reasonably raising Mr. Teniente's feelings of fear and vulnerability. Johnson yelled at Mr. Teniente to give him the money, while Lemon opened the passenger side door, an act which also could be reasonably viewed as a further physical threat to Mr. Teniente. When Mr. Teniente apparently did not turn over the money quickly enough, Johnson fatally shot him at close range. Johnson and Lemon then fled the scene together.

Such evidence amply supported the conclusion that Johnson and Lemon were engaged in a "felonious enterprise" to rob Mr. Teniente, during the commission of which Mr. Teniente was fatally shot. (*Thompson*, *supra*, 49 Cal.4th at p. 117; see *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743 ["The 'act' required for aiding and abetting liability need not be a substantial factor in the offense."]; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [" 'factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense' "]; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531-532 [perpetrator need not expressly communicate criminal purpose that is apparent from the circumstances as "[a]iding and abetting may be committed 'on the spur of the moment,' . . . as instantaneously as the criminal act itself"].) The record contains solid evidence supporting the jury's determination that Lemon was guilty, as an aider and abettor, of first degree felony murder arising from the attempted robbery of Mr. Teniente.

Lemon argues there were inconsistencies in the witness statements from the initial investigation and the witnesses' trial testimony, particularly as to the main prosecution witness, S.D. Given the 19-year lapse between the murder and the trial, it is not surprising there would be some inconsistencies as to certain details. In our view, to the extent there are inconsistencies, they are largely as to minor or collateral matters. S.D.'s core description of the events of November 22, 1995, remained remarkably consistent.

Moreover, in many instances, other testimony corroborated and bolstered her original account. For instance, S.D. could not recall at trial that she told detectives in 1995 that she saw Lemon open the passenger side door of the car when he and Johnson confronted the delivery man. But, Officer Decarvalho, the first officer to arrive on the scene, testified that the front passenger door was open. Further, Lemon argues S.D. first described seeing the shooting in her 2012 reinterview, but had previously said she had run upstairs after seeing the confrontation and only heard the gunshot. Again, Officer Decarvalho testified that Mr. Teniente was slumped over the steering wheel. That is precisely how, in her 2012 interview, S.D. described seeing Mr. Teniente after the gunshot. The reasonable inference is that she did witness the shooting, irrespective of her inability to articulate that as a 12-year-old in 1995.

Alternatively, Lemon contends there was no evidence he acted with actual malice to support first degree murder (Pen. Code, § 187). He contends the felony-murder rule, which relieves the prosecution of proving actual malice, rests on an unconstitutional mandatory presumption of malice. Lemon concedes *People v. Dillon* (1983) 34 Cal.3d 441 held to the

contrary and that we are constrained to follow it. Nevertheless, he argues the felony-murder rule "is a disfavored doctrine" that should be narrowly construed and not applied to juvenile offenders. The felony-murder rule applies in cases involving juvenile offenders accused of murder. Indeed, *Dillon* involved a 17-year-old defendant. We are bound by Supreme Court precedent and there is no basis for deviating from its dictates here.

b. The Special Circumstance Finding

Penal Code section 190.2 specifies the penalty to be imposed on a defendant convicted of first degree murder when a special circumstance allegation is found to be true. As relevant here, subdivision (d) provides that "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a [robbery] which results in the death of some person or persons, and who is found guilty of murder in the first degree therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole . . . ."

Where, as here, the defendant is over the age of 16 and under the age of 18 at the time of the murder, Penal Code section 190.5 specifies the penalty as life without the possibility of parole, but vests the trial court with discretion to impose a sentence of 25 years to life. Here, the court exercised its discretion to sentence Lemon to the minimum sentence of 25 years to life under section 190.5. Thus, the special circumstance allegation in this case is mere surplusage. We need not consider Lemon's substantial evidence argument since there is no

prejudice to him resulting from the jury's true finding on the special circumstance.

In any event, substantial evidence supported the true finding. Lemon and Johnson together planned to rob the pizza delivery man. Lemon ordered the pizza from S.D. and Y.W.'s apartment while Johnson was upstairs with Y.W. The defendants gave S.D. money to go pay for the pizzas, and then immediately after she had paid for them, they ran out together and confronted the delivery man. Johnson and Lemon positioned themselves on either side of the car, preventing any means of escape. Lemon opened the passenger door, thereby adding an element of intimidation and fear. He maintained his position and did not withdraw, even after Johnson escalated the encounter with his gun. After Johnson shot the victim, Lemon fled the scene with him. Lemon never did anything to aid the victim. We do not agree that Lemon has minimal culpability like the aider and abettor who acted only as a getaway driver in *Banks, supra*, 61 Cal.4th 788.

3. Cross-examination of Prosecution Witness S.D.

Lemon next contends the court prejudicially erred in denying his constitutional right to confront and cross-examine S.D., the main prosecution witness, about her alleged mental illness. Lemon argues the restriction on cross-examination also violated his constitutional rights to due process and to present a defense, and amounted to an abuse of the court's discretion under Evidence Code sections 352 and 780. Johnson joins in Lemon's arguments.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice,

confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Lemon sought and obtained pretrial access to S.D.'s medical records. Those records were transmitted under seal to this court for consideration on appeal. During the preliminary hearing, S.D. admitted on cross-examination that she had, at some unspecified time, been committed to hospitals on "a couple of holds" for mental health reasons. But she denied ever being diagnosed with schizophrenia or any kind of paranoid or delusional disorder. She denied ever being suicidal and said she just suffered from anxiety and had at some point been diagnosed as bipolar.

At trial, Lemon renewed his request to cross-examine S.D. about her mental health issues. Defense counsel conceded S.D. had the capacity to testify, but he wanted the ability to cross-examine her about any mental health issues as it pertained to her credibility. During proceedings outside the presence of the jury, defense counsel elaborated that there were records showing that on the same day she was released from the hospital with a diagnosis of manic depressive psychosis in March 2012, she was then interviewed by Detective Johnson and her statement was recorded.

Citing Evidence Code section 352, the court denied Lemon's request finding such evidence was not substantially probative of S.D.'s ability to have perceived the events she attested to in 1995,

and it would be confusing to the jury and constitute an undue consumption of time.

"[T]he confrontation clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense wishes. [Citation.] Judges retain wide latitude to impose reasonable limits on cross-examination." (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 841-842; see Pen. Code, § 1044 ["It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."].)

Moreover, "[a] witness may be cross-examined about his mental condition or emotional stability *to the extent it may affect his powers of perception, memory (recollection), or communication*. [Citations.] Also, expert psychiatric testimony may be admissible to impeach the credibility of a prosecution witness where the witness' mental or emotional condition may affect the ability of the witness to tell the truth. The admissibility of such testimony rests within the discretion of the trial court. Generally, however, attempts to impeach a prosecution witness by expert psychiatric testimony have been rejected." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 302, italics added.)

Here, there was no evidence S.D. suffered from any mental health issues in 1995 when she perceived the events to which she attested, nor any evidence that during the trial in November 2014 she suffered from any condition that impacted her ability to testify. As the trial court noted in its ruling, her testimony and statements over the 19 years showed a high degree of

consistency. Lemon noted that a doctor had been hired but did not say that the individual had examined S.D., had prepared a report or opinion as to her mental health status, or had any foundation for testifying.

We have reviewed the sealed medical records and are satisfied the court did not abuse its discretion under Evidence Code section 352 in excluding further cross-examination as requested by Lemon. In addition, there was extensive cross-examination of S.D. on a wide range of issues, including the inconsistent portions of her statements regarding the shooting, the level of her vision problems that may have impacted her ability to perceive the shooting, and her substance abuse problem, including that she had been arrested for possession of methamphetamine.

Nor do we find any constitutional error. " ' "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citation.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, *unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility*" [citation], the trial court's exercise of its

discretion in this regard does not violate the Sixth Amendment.' " (*People v. Linton* (2013) 56 Cal.4th 1146, 1188, italics added; accord, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.)

Lemon has not demonstrated that cross-examination regarding any mental health treatment S.D. may have received in 2012 would have produced a significantly different impression of her credibility as a witness. He has also not demonstrated that he was denied a fair trial or the ability to present a defense. " 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." ' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Assuming for the sake of argument the court's ruling was error, it was harmless by any standard.

4. Admission of Johnson's Out-of-court Statement

Lemon contends the court erred in admitting the out-of-court statement by Johnson that implicated Lemon as an accomplice. Lemon argues the hearsay statement was not admissible under Evidence Code section 1230 as a statement against interest, and the court's error was not only an abuse of discretion, but deprived him of his due process right to a fair trial. The Attorney General contends the due process objection was forfeited, and that in any event, the statement was properly admitted under section 1230.

First, we reject the Attorney General's claim of forfeiture. Lemon moved pretrial to exclude evidence of any hearsay statements that inculpated him, including the 1995 statement by Johnson to S.D. to the effect that he had shot the delivery man because if he had not done so then "he and James would be dead." The motion was denied.

"[A] trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. A defendant may *not* argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial. *A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process*." (*People v. Partida* (2005) 37 Cal.4th 428, 431 (*Partida*), first & third italics added.) "To the extent, if any, [the defendant] argues that due process required the court to exclude the evidence for a reason not included in the trial objection, that argument is forfeited . . . ." (*Ibid.*)

Lemon's objections below fairly informed the court and counsel of his grounds for seeking to exclude the hearsay statements of Johnson and have been preserved for appeal. We review the court's ruling to admit such statements for abuse of discretion. (*People v. Cortez* (2016) 63 Cal.4th 101, 125, fn. 5 (*Cortez*).)

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) "The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite

its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

Declarations against penal interest, however, may also contain self-serving and unreliable information, and " ' "a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not." ' " (*Duarte, supra,* 24 Cal.4th at p. 611.) "Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, *also* be exculpatory or have a net exculpatory effect." (*Id.* at p. 612.) Because of such concerns, Evidence Code "section 1230's exception to the hearsay rule [is] 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' " (*Duarte*, at p. 612.) Thus, a hearsay statement " 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' " (*Ibid.*)

Lemon argues the portion of Johnson's statement implicating Lemon as being at the scene was "entirely collateral" and not self-inculpatory under *Duarte* and therefore should have been excluded. But, *Duarte* explained that " 'whether a statement is self-inculpatory or not can only be determined by viewing it in context.' " (*Duarte, supra,* 24 Cal.4th at p. 612.) No part of Johnson's statement was exculpatory. No part of it was "self-serving." (*Id.* at p. 611.) The statement did not attempt to shift blame to Lemon or otherwise try to place the "the major responsibility" for the shooting on Lemon. (*Id.* at p. 612; see *Cortez*, *supra*, 63 Cal.4th at p. 128.)

In short, Johnson's reference to Lemon was an integral part of the statement in which he implicated himself in the robbery

and shooting. The context in which the statement was made was plainly self-inculpatory as Johnson admitted his responsibility for the murder. The reference to Lemon was part of his explanation for his motive in shooting the victim and did not implicate Lemon in any conduct other than his presence at the scene. The fact that Lemon was present was largely uncontradicted in the evidence. Moreover, the attendant circumstances under which Johnson made the statement provided further indicia of reliability. The statement was made in a private setting, on the telephone, to someone deemed to be a friend, and thus without coercion or reason to fabricate. Under such facts, there was no error in the trial court's admission of Johnson's statements to S.D. implicating Lemon. (*Cortez*, *supra*, 63 Cal.4th at p. 128.)

Lemon argues the admission of the hearsay statement was an error of such magnitude that it amounted to a violation of his due process right to a fair trial. "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*Partida*, *supra*, 37 Cal.4th at p. 439.) Lemon argues only that the prosecution's case was weak, and the hearsay statement of Johnson was improperly admitted to bolster the otherwise weak and conflicting statements of the witnesses. As we explained, the statement was not improperly admitted, but even assuming it was, Lemon has not articulated an argument that the admission resulted in a trial that was fundamentally unfair.

Finally, we note that Lemon concedes the challenged statement was nontestimonial and that the Sixth Amendment has no application to nontestimonal hearsay statements. (See *Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Arceo*

(2011) 195 Cal.App.4th 556, 571-574.) Lemon therefore did not raise any confrontation clause argument.

5. Lemon's Claims of Instructional Error

Lemon argues the court erred by instructing the jury on first degree felony murder and in failing to instruct on lesser included offenses. We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) We find no such error.

a. First Degree Felony Murder

Lemon's arguments are threefold: First, he restates his substantial evidence argument that proof of malice is required for first degree murder but the record lacked any evidence of malice aforethought, and therefore the instruction should not have been given. Next, Lemon argues the felony-murder rule should not apply to juveniles. And finally, he argues that under the merger doctrine, robbery, which has an assaultive aspect, merges with homicide and instruction on felony murder was therefore improper. Johnson joined in Lemon's first two arguments. All three arguments are without merit.

As we already explained above, the felony-murder rule applies to juveniles and does not require proof of malice. We need not address those points further.

In *People v. Gonzales* (2011) 51 Cal.4th 894 (*Gonzales*), the Supreme Court rejected an argument analogous to Lemon's argument regarding the merger doctrine and felony murder. In *Gonzales*, the defendant argued that a conviction of mayhem felony murder violated the merger doctrine as "articulated in *People v. Ireland* (1969) 70 Cal.2d 522, a second degree murder case, and extended to first degree felony murder in *People v. Wilson* (1969) 1 Cal.3d 431, 441-442 (*Wilson*)." (*Gonzales*, at

p. 942.) The defendant admitted that *Wilson* had recently been overruled in *People v. Farley* (2009) 46 Cal.4th 1053 (*Farley*), which "held, *prospectively*, that the merger doctrine has no application to first degree felony murder." (*Gonzales,* at p. 942, italics added.) But, the defendant argued her charged offense predated *Farley* and therefore the rule of *Wilson* still applied to her case. The *Gonzales* court disagreed, explaining that the court's pre-*Farley* jurisprudence "had limited *Wilson* to cases of burglary felony murder where the defendant's only felonious purpose was to assault or kill the victim." (*Gonzales,* at p. 942.)

Defendants here were charged and convicted of first degree felony murder with attempted robbery, not burglary, as the underlying felony. Thus, under *Gonzales*, instruction on first degree felony murder was proper irrespective of the prospective application of *Farley*. Lemon's reliance on *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*) is unavailing. *Chun* concerned *second degree* felony murder and concluded that where the elements of the underlying felony "have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive." (*Chun,* at p. 1200.) Lemon, failing to address *Gonzales* at all, argues that under *Chun* robbery has "an assaultive aspect" and therefore merges with homicide. Not so. It is well established that robbery, while it may include assaultive behavior, nonetheless has an independent felonious purpose, namely to "acquire money or property belonging to another." (*People v. Burton* (1971) 6 Cal.3d 375, 387, overruled in part on other grounds in *People v. Lessie* (2010) 47 Cal.4th 1152, 1157-1158.) Robbery therefore does not merge with homicide. (*Burton*, at pp. 387-388.) *Chun*, while it

overruled a number of earlier precedents, did not, as Lemon concedes, overrule *Burton*. (See *Chun*, at p. 1201.)

b. Lesser Included Offenses

Lemon claims the court erred in failing to instruct on theft and involuntary manslaughter as lesser included offenses. "Theft is a necessarily included offense of robbery." (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) "Involuntary manslaughter is ordinarily a lesser offense of murder." (*People v. Abilez* (2007) 41 Cal.4th 472, 515.) Lemon argues there was substantial evidence upon which the jury could have found that he only aided and abetted an attempted theft, not robbery, and therefore any resulting death could be no more than involuntary manslaughter. We are not persuaded.

The court's obligation to instruct on all principles of law relevant to the issues raised by the evidence at trial includes the obligation to instruct " 'on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' " (*People v. Smith* (2013) 57 Cal.4th 232, 239; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345.) "An instruction on a lesser included offense *must be given only when the evidence warrants such an instruction*. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174, italics added.)

As we explained above, there was substantial evidence that Lemon aided and abetted an attempted robbery that resulted in a

murder. Under no reasonable interpretation of the evidence was there only a theft and not a robbery.

6. Lemon's Eighth Amendment Claim

Lemon argues his sentence of 25 years to life is "effectively" a life sentence given his age at the time of sentencing and his life expectancy, and thus violates both the federal and state constitutional proscriptions against cruel and unusual punishment. Lemon also argues the record demonstrates he was not only under the age of 18 at the time of the crime but less culpable than Johnson and not deserving of a sentence in which he has no meaningful opportunity to obtain parole. "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.)

"A sentence violates the state prohibition against cruel and unusual punishment (Cal. Const., art. I, §§ 6, 17) if ' "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience." ' [Citations.] [¶] A sentence violates the federal Constitution [(U.S. Const., 8th & 14th Amends.)] if it is 'grossly disproportionate' to the severity of the crime." (*People v. Russell* (2010) 187 Cal.App.4th 981, 993.) Outside the context of a capital sentence, " 'successful challenges to the proportionality of particular sentences have been exceedingly rare.' " (*Ewing v. California* (2003) 538 U.S. 11, 21 [affirming sentence of 25 years to life imposed on a third strike offender convicted of felony grand theft for the theft of $1,200 worth of merchandise].)

Where, as here, the defendant was a juvenile at the time the offense was committed, the sentencing court must take into consideration the juvenile offender's " 'chronological age and its

hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1388 (*Gutierrez*), quoting *Miller v. Alabama* (2012) 567 U.S. 460, 477 (*Miller*).) *Miller* reasoned that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.' " (*Miller*, at p. 471.)

Lemon was convicted of first degree felony murder. Penal Code section 190.5, subdivision (b) provides, in relevant part, that "[t]he penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . , who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." *Gutierrez* concluded that the sentencing scheme created by section 190.5 does not offend the Constitution as it "authorizes and indeed requires consideration of the distinctive attributes of youth highlighted in *Miller*." (*Gutierrez*, *supra*, 58 Cal.4th at p. 1361.)

The record demonstrates the trial court gave serious consideration to the parties' sentencing memoranda and allowed for significant argument regarding the appropriate sentence. Indeed, Lemon makes no claim that the trial court failed to take into consideration the *Miller* factors in imposing sentence. Rather, Lemon focuses almost exclusively on the fact that he was in his 30's at the time of sentencing and therefore a 25-year-to-life sentence operates as a de facto life sentence, delaying any chance at parole until he is 61.

Lemon actively participated with Johnson in the attempted robbery and murder of an unarmed pizza delivery man. He left the state following the crime and was free for some 19 years without having to face the consequences of his conduct. He has an opportunity to be paroled at the age of 61. We do not agree that Lemon's sentence is grossly disproportionate to the crime, that it shocks the conscience, or that Lemon does not have a meaningful chance at parole.

7. The Denial of Lemon's *Pitchess* Motion

Lemon contends the court erred in denying his motion for discovery pursuant to *Pitchess* without reviewing any personnel records in camera. Lemon's motion sought personnel records of Detectives Cable and Collette related to false reports, lying, and untruthfulness. On appeal, Lemon argues only that he established good cause for production of records related to Detective Cable. "A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion." (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

"To show good cause as required by [Evidence Code] section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citation] that would support those proposed defenses." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).) "Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct." (*Ibid.*)

The *Pitchess* motion in this case did not propose a defense to the charge of murder nor articulate how the requested

discovery would support any proposed defense. Neither did the motion describe a factual scenario supporting the claimed officer misconduct and explaining Lemon's own actions in a manner that would have established some type of defense. The motion asserted that Lemon was looking for witnesses to testify that the officer had character traits and habits of providing false reports, lying and untruthfulness. In other words, Lemon sought evidence of the officer's character or a trait of his character, evidence made inadmissible by Evidence Code section 1101. Counsel added in his points and authorities that "*it would not hurt* for the court to examine" the personnel records in camera (italics added). Such argument ignores the duty of the trial court to carefully balance the peace officer's just claim to confidentiality against Lemon's right to a fair trial. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227 [*Pitchess* and Evid. Code, §§ 1043-1047 recognize that the officer in question has a strong privacy interest in his or her personnel records and that such records should not be disclosed unnecessarily].)

Counsel's declaration fell far short of demonstrating good cause for an in camera hearing as explained fully by our Supreme Court in *Warrick*. In *Warrick*, the police report stated that three police officers on patrol noticed the defendant standing next to a wall holding a baggie containing off-white solids; the officers approached; the defendant fled, discarding off-white lumps resembling rock cocaine; one of the officers retrieved 42 lumps from the ground; and when the two other officers arrested the defendant after a short pursuit, he held an empty baggie in his hand and had $2.75 cash in his pockets. (*Warrick, supra*, 35 Cal.4th at p. 1016.) Defense counsel's declaration described an alternate version of the events, explaining that the defendant fled

when the officers got out of the patrol car because he feared an arrest on an outstanding parole warrant, and when the officers caught up with him " 'people [were] pushing and kicking and fighting with each other' " as they collected rock cocaine from the ground; two officers retrieved some of the rocks; when one of them told the defendant he must have thrown it, the defendant denied possessing or discarding any rock cocaine, and explained he was in the area to buy cocaine from a seller there. (*Id*. at p. 1017.) Defense counsel linked this version to the potential defense by suggesting "that the officers, not knowing who had discarded the cocaine, falsely claimed to have seen defendant, who was running away, do so." (*Ibid*.)

In contrast to the declaration of defense counsel in *Warrick*, the declaration here did not describe an alternate version of events in contrast to the police reports. It summarily described two facts and one omission in two police reports, which counsel asserted might lead to the discovery of evidence of a character for dishonesty. It also stated that Detective Cable was fired from the Long Beach Police Department. The declaration says nothing about *when* Detective Cable was fired, or *why* he was fired, or even the basis for counsel's statement that he had been fired. The declaration offers no facts based on which one might infer that Detective Cable was fired for false reports, lying or dishonesty or for anything at all having to do with the investigation of the murder of Mr. Teniente.

The declaration stated Detective Cable and another detective wrote a report that included Tyrone's statement that Lemon told Tyrone he was there when Johnson shot the delivery man but he (Lemon) did not do the shooting. A copy of this report was attached as an exhibit to counsel's declaration. The

declaration states that Lemon denied making that statement. The declaration did *not* say that Tyrone denied repeating Lemon's out-of-court statement to Detective Cable, or that Detective Cable did not accurately report what Tyrone told him. Counsel also declared this report omitted to mention that at one stage of the investigation, Tyrone had been arrested as a suspect involved in the murder. The declaration did *not* state that fact was withheld from the defense; only that it was not mentioned in this particular report. Indeed, defense counsel attached as an exhibit to his declaration a portion of Tyrone's preliminary hearing testimony in which the defense cross-examined him about his arrest. Tyrone testified at the preliminary hearing three months before Lemon filed his *Pitchess* motion, so there is no doubt that Tyrone's arrest was disclosed to the defense well before Lemon was held to answer in this case.

The only other fact cited in counsel's declaration is that Detective Cable wrote in another report that he was present at the live lineup in which Lemon was in position No. 3. Counsel's declaration states that, "At the line-up, [V.B.] twice failed to identify anyone. [¶] . . . Nonetheless, Detective Cable claims that outside the line-up he heard [V.B.] later tell the Deputy District Attorney that he could identify Mr. Lemon." Defense counsel declared, "Our investigation reveals that [V.B.] never made such a statement." Counsel attached a copy of this report as an exhibit to his declaration. In relevant part, the report summarized the conversation between V.B. and the deputy district attorney as follows: "I heard [the deputy district attorney] say to [V.B.] something along the lines of, 'So now you're telling me it's number three?' I also heard her ask the witness if he was positive and I heard his response to be that he

was. The witness was then asked by the District Attorney why he filled out the form the way he did, which caused the witness to respond in an aggravated manner. [¶] The witness told the District Attorney that he did not want to be stressed, that he was sick and this was not doing him any good. [¶] I suggested to the District Attorney that we not talk with the witness any further regarding his statement and I suggested to her that, maybe after thinking about the line-up by himself, he was now able to make an identification."

Warrick explained how to assess the evidence in support of a *Pitchess* motion to determine whether the defendant has established good cause for in-chambers review of an officer's personnel records. "[T]he trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial?" (*Warrick*, *supra*, 35 Cal.4th at pp. 1026-1027.)

Defense counsel's declaration here did not show a logical connection between any statements or omission in the police reports and any defense. Nothing is offered to explain how Lemon's denial that he told Tyrone he was there when Johnson shot the delivery man supports any proposed defense. Lemon's denial that he made the out-of-court statement to Tyrone in no

way implicated the accuracy of Detective Cable's report of what Tyrone told him. Defense counsel did not state the defense believed Detective Cable lied about what Tyrone told him. Likewise, nothing is offered to explain how V.B.'s statement to the deputy district attorney might be admissible at trial or might support any defense. The report of V.B.'s conversation with the deputy district attorney accurately states that V.B. did *not* identify Lemon in the lineup, although he admitted afterward and "off the record" that he could have. Counsel's declaration that some undisclosed investigation revealed V.B. never made such a statement is insufficient without more to demonstrate police misconduct, and it does not show a logical connection to any proposed defense.

In *People v. Thompson* (2006) 141 Cal.App.4th 1312, which was decided after *Warrick*, the court affirmed the denial of the *Pitchess* motion because the declaration merely denied the elements of the offense, without presenting a factual account of the scope of the alleged police misconduct, explaining the defendant's own actions in a manner that supported his defense, suggesting a nonculpable reason for his presence in an area where drugs were being sold or for being singled out by the police, or asserting "any 'mishandling of the situation' prior to his detention and arrest." (*Thompson,* at p. 1317.)

Similarly, here there is no factual account of police misconduct nor any facts offered to explain Lemon's own actions in a manner that suggested a nonculpable reason for his presence in the apartment of S.D. and Y.W. on the night of the murder of the pizza delivery man. Lemon has not demonstrated the trial court abused its discretion.

8. Cumulative Error

Lemon urges us to find that even if none of his claims of error individually warrants reversal, their cumulative effect nonetheless requires reversal. We are not persuaded. "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Whether viewing his claimed errors individually or cumulatively, Lemon has failed to show he was deprived of a fair trial. At most, Lemon has shown his trial was " ' " 'not perfect—few are.' " ' " (*Farley*, *supra*, 46 Cal.4th at p. 1124.)

9. Johnson's Parole Revocation Fine

Johnson contends the court erred in imposing a parole revocation fine because he was sentenced to a term of life without the possibility of parole. The Attorney General concedes the fine is improper. The imposition of a parole revocation fine pursuant to Penal Code section 1202.45 is unauthorized where the defendant's sentence contains no period of parole. (See *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; accord, *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185-1186.) Johnson's $10,000 parole revocation fine must be stricken.

DISPOSITION

Johnson's judgment of conviction is modified in the following respects: the parole revocation fine of $10,000 is stricken. Johnson's judgment is conditionally reversed, and the case is remanded for the juvenile court to hold a transfer hearing within 90 days from the filing of the remittitur. If, following that hearing, Johnson is found suitable for criminal court, the judgment shall be reinstated. If not, the juvenile court shall enter an appropriate disposition. If the judgment is reinstated,

the superior court is directed to prepare and transmit an abstract of judgment to the Department of Corrections and Rehabilitation reflecting the modification to the parole revocation fine.

Lemon's judgment is conditionally reversed, and the case is remanded for the juvenile court to hold a transfer hearing within 90 days from the filing of the remittitur. If, following that hearing, Lemon is found suitable for criminal court, the judgment shall be reinstated. If not, the juvenile court shall enter an appropriate disposition.

FLIER, J.

I CONCUR:

RUBIN, Acting P. J.

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GRIMES, J., Concurring and Dissenting.

I concur with parts 2 through 9 of the majority opinion's discussion, which remain unchanged from our original unpublished opinion filed October 28, 2016. However, because I conclude that Proposition 57[1] does not apply retroactively and that both judgments of conviction should again be affirmed, I respectively dissent from part 1 of the majority opinion's discussion and the disposition.

Further, the majority concludes defendants and appellants Venda Johnson and James Lemon are entitled to a remand for a juvenile fitness hearing. The majority therefore found it unnecessary to resolve defendants' contention from the original briefing that former Welfare and Institutions Code section 707, subdivision (d) (hereafter former section 707(d)) was improperly applied retroactively in violation of the ex post facto clauses of both the state and federal Constitutions. (Maj. opn. *ante*, at p. 30, fn. 8.) Because I would affirm and disagree any remand is appropriate, I explain, consistently with our original opinion, why defendants' ex post facto argument is without merit.

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1 The Public Safety and Rehabilitation Act of 2016.

1. Defendants Contend Former Section 707(d) Was Applied Retroactively in Violation of the Ex Post Facto Clauses of Both the State and Federal Constitutions.

Defendants contend the prosecutor's direct filing of charges in criminal court in 2014 pursuant to former section 707(d)[2] was an unconstitutional retroactive application of the statute. I disagree.

The Gang Violence and Juvenile Crime Prevention Initiative of 1998 (Proposition 21) was passed by the voters March 7, 2000, and became effective the next day. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 165 (*John L.*).) Proposition 21 made numerous changes to certain laws applicable to juveniles accused of committing criminal offenses. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 545 (*Manduley*).) As relevant here, Proposition 21 amended former section 707(d) to confer "upon prosecutors the discretion to bring specified charges against certain minors directly in criminal court, without a prior adjudication by the juvenile court that the minor is unfit for a disposition under the juvenile court law." (*Manduley*, at p. 545.)

As amended by Proposition 21, former section 707(d) provided, in relevant part, that for certain enumerated offenses such as murder "the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older[.]"

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[2] I discuss the repeal of former section 707(d) by Proposition 57, during the pendency of this appeal, in part 2, *post*.

In November 1995 when the murder was committed, Johnson was 16 and Lemon was 17. Defendants argue that because they were juveniles at the time the offense was committed, they were statutorily entitled in 2014 at the ages of 35 and 36 to a fitness hearing to determine whether they would have been able to establish their fitness to be tried in juvenile court in 1995. They argue that the direct filing of charges in criminal court in 2014 when they were middle-aged adults deprived them of a juvenile adjudication fitness hearing and was a retroactive application of Proposition 21 that violated the ex post facto clause of both the federal and state Constitutions. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.)

"In general, the high court has established that no statute falls within the ex post facto prohibition unless 'two critical elements' exist. [Citations.] First, the law must be retroactive. Such a law ' "change[s] the legal consequences of an act completed before [the law's] effective date," *namely the defendant's criminal behavior*.' [Citation.]" (*John L.*, *supra*, 33 Cal.4th at p. 172.) "Second, only *certain* changes in the statutory effect of past criminal conduct implicate ex post facto concerns. Since its decision in *Collins v. Youngblood* (1990) 497 U.S. 37, 41-42 (*Collins*), the United States Supreme Court has followed the original intent of the Constitution, and reaffirmed the principles first announced in *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390 (opn. of Chase, J.) (*Calder*). [Citations.] Specifically, retroactive amendments to penal statutes do not violate ex post facto principles unless they implicate at least one of four categories described in *Calder*[.]" (*Ibid.*)

The four *Calder* categories may be summarized as follows: (1) any law that criminalizes conduct that was innocent went

done; (2) any law that aggravates a crime or makes it greater than when it was committed; (3) any law that inflicts greater punishment on conduct than that which was affixed to the crime at the time it was committed; and (4) any law that lessens the burden of proof or the quantum of evidence necessary to convict the offender. (*John L.*, *supra*, 33 Cal.4th at p. 172, fn. 3.)

In *Collins*, the Supreme Court "criticized some of its own decisions for disallowing any 'procedural change' that withdraws ' "substantial protections" ' or ' "substantial personal rights" ' existing at the time of the crime. [Citation.] *Collins* explained that regardless of its label or form [citation], a law does not raise ex post facto concerns unless it works in the manner [proscribed by *Calder*]. [¶] *Collins* also overruled two high court cases invalidating statutes merely because they ' " 'alter[ed] the situation of a party to his disadvantage' " ' after the crime occurred." (*John L.*, *supra*, 33 Cal.4th at p. 173.)

Of particular significance here, the Supreme Court has also explained "that adjustments in 'the procedures by which a criminal case is adjudicated' rarely implicate ex post facto concerns. [Citation.] Such laws do not typically enhance punishment under the third *Calder* category." (*John L.*, *supra*, 33 Cal.4th at p. 173; accord, *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.) "[A] substantial and disadvantageous change is prohibited only if it 'inflicts a greater *punishment*, than the law annexed to the crime, when committed.' [Citation.] Unless the consequences are penal in nature, defendants cannot rely on statutes in existence at the time of the crime, or otherwise complain of oppressive retroactive treatment." (*People v. Ansell* (2001) 25 Cal.4th 868, 884.)

Former section 707(d), which authorized the filing of criminal charges against a juvenile offender directly in the criminal court, did not change the legal consequences of defendants' behavior or otherwise enhance the punishment for that behavior. In 1995 when the offense was committed, a juvenile over the age of 16 charged with murder was statutorily presumed unfit for juvenile court administration. (*People v. Superior Court of San Francisco* (1981) 119 Cal.App.3d 162, 174; see also Welf. & Inst. Code, former § 707, subds. (b)(1) & (c) (1994 Stats., ch. 448).) As defendants concede, in 1995 they could have been punished with a sentence of life without parole for first degree murder in criminal court. Proposition 21 did not increase the penalty for first degree murder.

Former section 707(d) also did not fall into any of the four *Calder* categories. Instead, it was a change in procedure that could lawfully be applied to crimes committed before its enactment. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288 (*Tapia*) [concluding that provisions of Proposition 115 affecting the conduct of criminal trials can constitutionally be applied to trial of a crime committed before its enactment]; see also *People v. Williams*, *supra*, 196 Cal.App.3d at p. 1160 ["procedural changes generally are considered outside the reach of the ex post facto clause"].)

Defendants, who were 35 and 36 years old when tried for murder, had no statutory or constitutional right to have their case heard in the juvenile division of the superior court as opposed to the criminal division. (*Manduley*, *supra*, 27 Cal.4th at p. 570 [a juvenile offender alleged to have violated one of the enumerated felonies possesses "no right to be subject to the juvenile court law"].) That is a matter for the Legislature or the

electorate to decide. (*Id*. at pp. 564-565; accord, *Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649, 1658.)

At the time of the filing of charges and defendants' trial in 2014, former section 707(d) was the law. The prosecutor followed the law that had been in effect since 2000. Former section 707(d) was not applied retroactively to defendants, and there was no ex post facto violation. It was a lawful prospective application of the statute. I see no purpose that might have been served if the trial court, in 2014, had engaged in a speculative and utterly theoretical inquiry into whether either of them might have been fit for juvenile adjudication in 1995. As even more mature adults today, they are clearly now unfit for juvenile adjudication, and I see no purpose in remanding for a purely hypothetical determination by the juvenile court whether either might have been fit for juvenile adjudication more than 20 years ago.

2. Defendants Contend Proposition 57 Must Be Applied Retroactively.

After the filing of our original opinion affirming defendants' convictions, the voters passed Proposition 57. It became effective the next day, November 9, 2016. (Cal. Const., art. II, § 10, subd. (a).) As relevant here, Proposition 57 repealed former section 707(d). As amended by Proposition 57, Welfare and Institutions Code section 707 now requires a prosecutor to make a motion for transfer in the juvenile court in order to prosecute a juvenile offender in criminal court. In relevant part, the statute now specifies that, for certain enumerated felonies, "the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction." (§ 707, subd. (a)(1).) After consideration of certain specified criteria, "the juvenile court shall decide whether

the minor should be transferred to a court of criminal jurisdiction." (*Id*., subd. (a)(2).)

"It is well settled that a new statute is presumed to operate *prospectively* absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia, supra,* 53 Cal.3d at p. 287, italics added; see also Pen. Code, § 3.) With respect to the provisions at issue here, Proposition 57 does not contain an express statement of intent regarding retroactive application. Nor do the initiative's stated purposes provide a basis upon which retroactive intent can be reasonably inferred. Indeed, as our colleagues in the Sixth District aptly observed, "there is arguably textual support for an inference of *prospective* intent. One stated purpose is to require judges rather than prosecutors to decide 'whether juveniles *should* be tried in adult court.' [Citation.]" (*People v. Mendoza* (2017) 10 Cal.App.5th 327, 344-345 (*Mendoza*).) The language suggests the new provision is meant to apply only to cases that have not yet been tried.

Moreover, as explained above with respect to Proposition 21, whether a prosecutor is allowed to file charges directly in criminal court or is required to file a motion for transfer in juvenile court is a procedural matter pertaining to the conduct of future trials. Such procedural rules are applied prospectively. (See, e.g., *Tapia*, *supra*, 53 Cal.3d at p. 288 ["a law addressing the conduct of trials still addresses conduct in the future" and is applied prospectively]; see also *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, 775-776 (*Lara*), review granted May 17, 2017, S241231 ["[r]equiring a juvenile judge to assess whether [a juvenile offender] is tried in adult court strikes us as a 'law governing the conduct of trials.' "].) *Lara* concluded

that Proposition 57 "can only be applied prospectively." (*Lara*, at p. 775.)

Defendants' argument that Proposition 57 must be applied retroactively directly contradicts their argument that Proposition 21 was applied retroactively to them in violation of the ex post facto laws. Defendants ignore the logical inconsistency of their contentions and make no attempt to reconcile what is manifestly irreconcilable. I believe Propositions 21 and 57 both implemented procedural changes and both apply prospectively.

Defendants invoke the rule of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), which established the exception to the default rule of prospective application of new statutes. "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id*. at p. 745.)

Defendants contend Proposition 57's repeal of the direct filing system operates as a mitigation of punishment, and *Estrada* therefore compels retroactive application. Defendants also contend a failure to apply Proposition 57 retroactively would violate their constitutional rights to equal protection and due process of law. Defendant Lemon further argues that the changes effected by Proposition 57 are substantive in nature (a "sea change" in the prosecution of juveniles), not merely a change in procedure, thus mandating retroactive application under

Montgomery v. Louisiana (2016) 577 U.S. __ [136 S.Ct. 718] (*Montgomery*).

Several courts have recently addressed the retroactivity of Proposition 57: *People v. Cervantes* (2017) 9 Cal.App.5th 569 (*Cervantes*), review granted May 17, 2017, S241323; *Lara*, *supra*, 9 Cal.App.5th 753; *Mendoza*, *supra*, 10 Cal.App.5th 327; *People v. Vela* (2017) 11 Cal.App.5th 68 (*Vela*); *People v. Marquez* (2017) 11 Cal.App.5th 816 (*Marquez*); and *People v. Superior Court (Walker*) (June 8, 2017; D071461) __Cal.App.5th __ [2017 Cal.App.Lexis 532] (*Walker*). All six cases involve the direct filing of charges against juveniles in criminal court. None involves the circumstances at issue here, namely, the direct filing of charges against mature adults following a cold case investigation.

In *Cervantes*, *Mendoza* and *Vela*, trial, conviction and sentencing occurred in criminal court while the defendants were still minors. In *Marquez* and *Walker*, the defendants were charged in criminal court at the age of 17 and were convicted and sentenced within a year or two of attaining majority. *Cervantes*, *Mendoza*, *Vela*, and *Marquez* were all pending in the Court of Appeal when Proposition 57 was passed. The *Mendoza* and *Vela* courts had issued decisions affirming the defendants' convictions, but granted rehearing to consider the impact of Proposition 57. *Cervantes* had not yet resulted in a decision, and the parties were granted leave to file supplemental briefs addressing Proposition 57. The *Marquez* court was considering the defendant's appeal following a resentencing hearing and granted him leave to file supplemental briefs.

Lara and *Walker* both involved writ petitions filed by the People. *Lara* involved consolidated writ petitions filed in five

cases in which charges had been direct-filed against juvenile offenders but none of the cases had proceeded to trial when Proposition 57 was passed. In *Walker*, the defendant had obtained a reversal of his conviction on direct appeal and was awaiting retrial when Proposition 57 passed. The trial court granted Walker's motion to transfer to juvenile court for a fitness hearing in light of the repeal of former section 707(d). The *Walker* court granted the People's petition to vacate that order and maintain the retrial in criminal court where charges had originally been filed.

Cervantes rejected the defendant's retroactivity argument on the following grounds: "(1) the juvenile division and criminal division of superior court both have subject matter jurisdiction over statutorily specified crimes committed by minors; (2) the statutory amendments under Proposition 57 do not amount to a reduction of a penalty and are not subject to retroactive application under *Estrada*; and (3) failing to extend the new hearing procedure to [defendant] does not deprive him of equal protection because a prospective procedural change in the law that treats offenders differently depending upon when their crimes were committed does not violate equal protection." (*Cervantes*, *supra*, 9 Cal.App.5th at p. 595.)

Mendoza similarly concluded Proposition 57 was not intended to apply retroactively. *Mendoza* relied extensively on our Supreme Court's decision in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*).) *Brown* considered the question of the retroactivity of a statute increasing the rate at which prisoners could earn credit for good behavior. In rejecting the defendant's argument for retroactive application of the new statute, *Brown* explained: "Defendant contends the rule of *Estrada*, *supra*,

63 Cal.2d 740, should be understood to apply more broadly to any statute that reduces punishment in any manner, and that to increase credits is to reduce punishment. Defendant's argument fails for two reasons: First, the argument would expand the *Estrada* rule's scope of operation in precisely the manner we forbade in [*People v. Evangelatos* (1988) 44 Cal.3d 1188, 1209]. Second, the argument does not in any event represent a logical extension of *Estrada*'s reasoning. We do not take issue with the proposition that a convicted prisoner who is released a day early is punished a day less. But, as we have explained, the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a legislative mitigation of the *penalty for a particular crime*" ' [citation] because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to ' "satisfy a desire for vengeance" ' [citation]. The same logic does not inform our understanding of a law that rewards good behavior in prison." (*Brown,* at p. 325.)

Marquez agreed with and followed *Cervantes* and *Mendoza*. (*Marquez*, *supra*, 11 Cal.App.5th at p. 821.) *Walker* similarly concluded that Proposition 57 should not be applied retroactively. (*Walker*, *supra*, 2017 Cal.App.Lexis 532, pp. **14-27.)

Cervantes, *Mendoza*, *Marquez*, and *Walker* correctly determined that the amendments implemented by Proposition 57 did "not expressly mitigate the penalty for any particular crime." (*Mendoza*, *supra*, 10 Cal.App.5th at p. 348; accord, *Cervantes*, *supra*, 9 Cal.App.5th at p. 601 [the procedural changes implemented by Proposition 57 do "not resemble the clear-cut reduction in penalty involved in *Estrada*"]; *Marquez*, *supra*, 11 Cal.App.5th at p. 826 ["Proposition 57's transfer of the fitness hearing procedure to juvenile court does not reduce punishment

for a particular crime."]; *Walker*, *supra*, 2017 Cal.App.Lexis 532, p. *27 ["*Estrada* and its progeny do not support the conclusion that Proposition 57 should be applied retroactively"].)

I agree with the well-reasoned analyses of *Mendoza*, *Cervantes*, *Marquez*, and *Walker* rejecting the retroactive application of Proposition 57. *Vela* is the only published case thus far that has determined Proposition 57 should be given retroactive effect.

Despite finding Proposition 57 should apply retroactively, *Vela* did *not* reverse defendant's convictions for a retrial, finding, "[n]othing is to be gained by having a 'dispositional hearing,' or effectively a second trial, in the juvenile court." (*Vela*, *supra,* 11 Cal.App.5th at p. 81.) Instead, the court in *Vela* conditionally reversed the conviction and sentence and ordered the juvenile court to conduct a juvenile transfer hearing. "If, after conducting the juvenile transfer hearing, the court determines that it would have transferred Vela to a court of criminal jurisdiction because he is 'not a fit and proper subject to be dealt with under the juvenile court law,' then Vela's convictions and sentence are to be reinstated. (§ 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred Vela to a court of criminal jurisdiction, then it shall treat Vela's convictions as juvenile adjudications and impose an appropriate 'disposition' within its discretion." (*Vela,* at p. 82.)

The defendant in *Vela* was 16 years old when he committed the murder and attempted murder for which he was sentenced to prison for 72 years to life. The opinion does not specify defendant's age at the time of the disposition on appeal, but the opinion is replete with references to the defendant as a *minor*. ("The implied intent of Proposition 57 was to retroactively extend

its emphasis on juvenile rehabilitation to every minor to whom it could constitutionally apply;" "a juvenile court judge can now exercise his or her discretion *in some cases* and determine that a minor should remain in the juvenile justice system;" "we infer that the electorate intended the possible ameliorating benefits of Proposition 57 to apply to every minor to whom it may constitutionally apply, including Vela.") (*Vela, supra,* 11 Cal.App.5th at pp. 76, 80, 81.)

The *Vela* opinion also emphasizes that, "[t]he purpose of the juvenile justice system is to rehabilitate minors" and, "[t]he express intent of Proposition 57 was to emphasize juvenile rehabilitation." (*Vela, supra,* 11 Cal.App.5th at pp. 73, 75, italics omitted.) I find the analysis and holding of *Vela* to be of no assistance in resolving the contentions of Lemon and Johnson in this case, as it seems incontrovertible that neither of them was "a fit and proper subject to be dealt with under the juvenile court law" in 2014 when they were charged, tried and sentenced, and much less so now.[3]

I turn now to defendants' claims that retroactive application of Proposition 57 is constitutionally required. I agree with the analyses in *Mendoza*, *Walker* and *Cervantes* rejecting the argument that failure to apply Proposition 57 retroactively to all cases not yet final on appeal will deny defendants their constitutional rights to equal protection. (See, e.g., *Mendoza*, *supra*, 10 Cal.App.5th at pp. 349-352.) Our Supreme Court concluded in *Manduley* that implementation of the direct filing

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[3] *Marquez* expressly disagreed with *Vela*'s analysis and its conclusion that Proposition 57's amendments to the Welfare and Institutions Code should be applied retroactively. (*Marquez, supra*, 11 Cal.App.5th at p. 827.)

system under Proposition 21 did not violate the equal protection clause. (*Manduley*, *supra*, 27 Cal.4th at pp. 567-573.) I agree that "if there was no equal protection problem in adopting the direct file procedure, there can be no equal protection problem in abandoning it. Both systems are merely different approaches or experiments in how best to deal with juvenile delinquents, and a state may change course without creating equal protection problems." (*Cervantes, supra*, 9 Cal.App.5th at p. 598, fn. 38; see also *People v. Floyd* (2003) 31 Cal.4th 179, 191 [" '[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' "].)

I further agree with *Mendoza* and *Marquez* that the procedural changes effected by Proposition 57 do not violate defendants' rights to due process of law. (*Mendoza*, *supra*, 10 Cal.App.5th at pp. 353-354; *Marquez*, *supra*, 11 Cal.App.5th at pp. 829-830.) I see no basis to further expound on these points.

Defendant Lemon contends Proposition 57 must be given retroactive effect because the changes it brought to juvenile law were so significant as to amount to a substantive change of law. Lemon relies largely on *Montgomery*, *supra*, 136 S.Ct. 718. There, the United States Supreme Court explained that "the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final." (*Montgomery*, at p. 729.)

In *Montgomery*, the court was faced with resolving whether the new rule it announced in *Miller v. Alabama* (2012) 567 U.S. 460 (mandatory life sentences without parole for juvenile

homicide offenders violate the Eighth Amendment) had to be given retroactive effect. *Montgomery* concluded *Miller* did announce a new substantive rule of constitutional law that had to be applied retroactively, including in state courts considering collateral review. (*Montgomery*, *supra*, 136 S.Ct. at pp. 732-733.) The court explained that substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.' [Citations.]" (*Id.* at pp. 729-730.)

The repeal of former section 707(d) and the amendment of Welfare and Institutions Code section 707 requiring a motion to transfer to criminal court did not amount to a new substantive rule of law. Proposition 57 effected only a new procedural rule related to the "manner of determining" a juvenile offender's culpability. *Montgomery* does not dictate a finding of retroactivity here.

I cannot ignore the elephant in the room to which defendants invite us to turn a blind eye, namely, that defendants were middle-aged adults when they were charged, tried and sentenced. I find it impossible to believe the voters intended Proposition 57, the focus of which is *juvenile* rehabilitation, to apply to murder charges against mature adults, mandating a reversal of their convictions, and remand to juvenile court to consider whether they are suitable to be treated like children.

Accordingly, I would affirm the judgment of conviction as to defendant Lemon and affirm the judgment of conviction as to defendant Johnson, as modified (striking the parole revocation fine as discussed in pt. 9 of the maj. opn.'s discussion and the disposition, *ante*).

GRIMES, J.